No. 86-1082

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Petitioner,

v.

LARRY WOLLERSHEIM,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

PETITIONER'S REPLY MEMORANDUM

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I. Respondent asserts that there is no constitutional issue warranting plenary review. He states that there were factual issues in dispute on the record which were relevant to the California Court of Appeal's consideration of whether or not to issue a stay, and that those factual issues were somehow resolved against petitioner by either the trial court or the California Court of Appeal.[1] From

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[1] During the proceedings in this Court on the application for a stay, respondent made a similar attempt to convince this Court that factual issues weighed against affording any relief. In reply, petitioner demonstrated, apparently at least to the tentative satisfaction of the Court, that there were *no* factual issues in dispute on the record of this case which were relevant to the question of a stay and upon which the California Court of Appeal arguably could have denied petitioner its request for a stay or reduction

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this, respondent argues that certiorari would be inappropriate because the only issue for review is whether the California Court of Appeal properly decided and applied those factual issues.[2]

Respondent's opposition distorts the record and proceedings below. There were no factual issues in dispute on the record of this case which were relevant to the Court of Appeal's determination of whether or not to grant a stay or reduction of bond. The relevant facts of record were simple and uncontroverted:

1. Petitioner was a bona-fide religious organization;

2. Petitioner's net assets were thirteen million dollars, of which 5.1 million dollars were unpledged;

3. Respondent's judgment was for thirty million dollars, twenty-five million of which was for punitive damages;

4. In order to obtain an automatic stay of execution, petitioner would have to post a cash bond of sixty million dollars, or a surety bond of forty-five million dollars, both

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of a bond. Petitioner further pointed out that respondent was free to return to the state court to attempt to prove his unsupported allegations. Petitioner's Reply Memorandum to Respondent's Opposition To A Stay at 5 n. 3. Respondent has made no effort to do so.

[2] Petitioner addressed its petition to the Court of Appeal of the State of California but noted that if the order of that Court is deemed to be a denial of discretionary review, it is respectfully requested that the petition be deemed addressed to the trial court, the Superior Court of the State of California, County of Los Angeles. Since the filing of the petition in this Court, and in light of petitioner's filing its brief on the merits of the underlying appeal in the California Court of Appeal, petitioner has filed a new application for a stay or reduction of bond in the California Court of Appeal. Petitioner will advise the Court of any ruling on that application.

of which were impossible given petitioner's limited assets; and

5. In the absence of a bond, petitioner faced imminent execution of the judgment against its assets, which could destroy it before it could pursue its statutory rights of appeal to the California courts and of certiorari to this Court.

The factual issues which respondent discusses in his opposition in this Court—*e.g.*, whether petitioner is the alter ego of other organizations, or they are its alter ego, and thus whether the assets of such other organizations are relevant to determine whether petitioner can post the statutory bond, or whether petitioner still provides religious services to its members—are not presented by the record of this case. They were not tried or decided in the trial court, and they were not the subject of a hearing or resolution by the Court of Appeal. (*See* Parts II and III, *infra*). Accordingly such questions could not have been the basis for the Court of Appeal's order denying petitioner's request for a stay of execution and reduction of the bond requirement.

The only issue before the Court of Appeal was whether, given the undisputed set of facts and circumstances set forth above (items 1 through 5) which *were* of record and properly before it, petitioner was entitled to a stay of execution without bond, or with a reduced bonding requirement which it could meet as a practical matter. The Court of Appeal's denial of the relief—without a hearing and within two days of filing of the application—squarely raises the constitutional question of whether the California bonding statute, as applied to the undisputed facts and circumstances of this case (and not to factual questions never tried nor decided) violated petitioner's due process, equal protection and First Amendment rights.

Respondent suggests that such "as applied" constitutional challenges to a statute do not merit plenary review by this Court. Respondent's implied preference for facial challenges to the constitutionality of state statutes is contrary to this Court's decisions. Just recently, the Court reiterated that "as applied" adjudication is the "preferred course" of constitutional decision-making "since it enables courts to avoid making unnecessarily broad constitutional judgments." *City of Cleburne* v. *Cleburne Living Center*, —— U.S. ——, 105 S.Ct. 3249, 3258 (1985). Indeed, in *Evitts* v. *Lucey*, 469 U.S. 387, 405 (1985) this Court held that once a state grants a right to an appeal, the state must "offer *each* defendant a fair opportunity to obtain an adjudication on the merits of *his* appeal." (Emphasis added.) *See also Lindsey* v. *Normet*, 405 U.S. 56, 65 (1972); *Boddie* v. *Connecticut*, 401 U.S. 371, 379-80 (1971). Once a party is given the right to appellate review, it has a due process right to a fair opportunity to process that appeal without the effectiveness of the appeal being precluded by an insurmountable bond requirement.[3]

Although *Texaco Inc.* v. *Pennzoil Co.*, 784 F.2d 1133 (2nd Cir. 1986) prob. juris. noted, —— U.S. ——, 106 S.Ct. 3270 (1986) involves an apparently absolute bonding requirement, nothing in the decision suggests that the same due process principles are not applicable to a facially more flexible statute which was inflexibly applied. Indeed, the crux of Texaco's challenge is precisely that the Texas

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[3] Respondent's attempt to obscure the significance of petitioner's claim is underscored by his failure to address the decision of the Fifth Circuit in *Henry* v. *First National Bank of Clarksdale*, 595 F.2d 291 (5th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980) (Petition at pp. 12-13). There, as here, although the state statutory scheme provided a means to reduce or waive the required bond, the state courts refused to do so. The only difference between *Henry* and this case in this respect is that the Church followed the traditional course of exhausting state court process rather than commencing an action in federal district court.

statute as applied to it in that case violates due process. See Brief of Appellee Texaco Inc. at 14-15 in *Pennzoil, Co.* v. *Texaco Inc.*, No. 85-1798. As the opinion of the Court of Appeals for the Second Circuit clearly states, it is the practical effect of the application of the bonding requirement in the context of the particular case which can constitute a due process violation.[4]

It is precisely the practical effect of the summary denial by the California court of petitioner's application without a hearing or statement of the grounds of its decision which has forced petitioner to seek certiorari.[5] As in *Henry* and *Texaco* the state has reduced the Church's right to appeal to a meaningless ritual by denying the Church the means effectively to press its appellate arguments.

II. Respondent asserts that the Court of Appeal denied a stay or reduction of bond because of purported evidence that "petitioner's ostensible, separate corporate existence is a sham" and that the assets of other Scientology churches allegedly are part of petitioner's assets and could be used to meet the statutory bonding requirement (Opp. at 7).

The issue of separate corporate status, however, was not an issue in the trial below and was never litigated,

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[4] Thus, as the Second Circuit stated "[a] state would deny a defendant such a 'fair opportunity' [to obtain an adjudication on the merits of his appeal] if it reduced the appeal to a 'meaningless ritual' by denying him the means effectively to press his appellate arguments. . . ." 784 F.2d at 1154 quoting *Douglas* v. *California*, 372 U.S. 353, 358 (1963). The court continued, "[i]t is self-evident that an appeal would be futile if, by the time the appellate court considered his case, the appeal had by application of a bonding law been robbed of any effectiveness." *Id.*

[5] Respondent's suggestion (Opp. 5 n.5) that it is questionable whether petitioner preserved its federal constitutional claims is without basis. Petitioner clearly raised its claims in the state courts. *See* Petition for Writ of Supersedeas or Other Appropriate Stay Order; Points and Authorities, at 6-7, 19-21. (A copy of the Petition was previously provided to the Court in connection with the proceedings for a stay.)

let alone decided by the trial or appellate court. It is true that, near the end of trial, respondent attempted unsuccessfully to elicit testimony that a corporate re-organization of the church in 1981, pursuant to which various functions of petitioner were transferred to other Scientology churches, resulted in a reduction of the net worth or liquid assets of petitioner. That effort failed to produce a scintilla of evidence, however, to support the respondent's allegation, and the trial court cut short the respondent's line of inquiry as irrelevant to the issue before it (Tr. 14,312-13).[6] Indeed the only evidence in the record of the Superior Court was directly to the contrary.[7] Thus, there

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[6] The trial court's argumentative post-trial remark—by no means stated as a finding or "conclusion"—that petitioner "is a mere shell" (Opp. at 7) was not and could not have been intended as suggesting that petitioner had stripped itself of all assets, in light of the court's own evidentiary rulings, the non-existence of any supporting evidence, and the uncontroverted evidence that petitioner maintained net assets of over thirteen million dollars, 5.1 million of which was unencumbered. Rather, the real import of the trial court's remark, in the context in which it was made, was that since petitioner allegedly no longer provides ecclesiastical services, it cannot claim that execution upon its assets will infringe upon the First Amendment rights of its members. (Tr. Sept. 26, 1986 at 5: "Your argument is directed toward the inability of parishioners to have a place to pursue their religious interests [if execution of judgment is not stayed].")

As noted in the text, (Part III, infra), the trial court's suggestion was wrong for two reasons. First, as petitioner's counsel immediately pointed out to the trial judge, there was no evidence in the record that petitioner now engages only in legal defense or public relations activities. Second, even if the allegation were true, it would not render petitioner "a mere shell" not entitled to First Amendment protection. Indeed, defense of the religious movement against legal or public attacks, and public dissemination and proselytization of the religion (i.e., public relations) are quintessential First Amendment activities. *NAACP* v. *Button*, 371 U.S. 415, 428-31 (1963); *Murdock* v. *Pennsylvania*, 319 U.S. 105, 108-10 (1943).

[7] In a declaration submitted to the trial court pursuant to an evidentiary motion, on which the Church prevailed, church coun-

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is no basis to conclude that the issue of fraudulent transfer of assets played any part in the California Court of Appeal's denial of a stay or reduction of bond.

Nor can conclusions of alter ego status be derived, as respondent attempts to do (Opp. at 7), from the fact that petitioner serves as the legal defense organization for various other Scientology organizations and individuals. Such legal and public defense services are performed by a plethora of organizations in this country; it has never been suggested until now that such an organization's provision of such services converts it into the alter ego of an organization to which it provides them.

Accordingly, it simply is not open to respondent to argue that the California Court of Appeal denied petitioner's stay application on the basis of conclusions about its relationship to other Scientology organizations, or upon a determination of the net assets available to other Scientology organizations.[8]

III. Respondent also suggests that the California Court of Appeal denied relief to petitioner because of purported evidence that petitioner no longer provides substantial

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sel John G. Peterson explained the nature and scope of the corporate reorganization and stated:

> Each of the transfers for each of the corporations were equal value for equal value, with both assets and liabilities in the transfers. The net worth of the Church of Scientology of California was not changed whatsoever by the reorganization itself, and in fact, its cash assets increased.

Declaration dated July 7, 1986, ¶9, previously submitted to the Court as Appendix B to Petitioner's Reply Memorandum to Respondent's Opposition To A Stay in *Church of Scientology of California* v. *Wollersheim*, No. A-271 (S.Ct.).

[8] Indeed, there was *no* evidence below as to the gross or net assets of any other Scientology church or organization.

religious services to its members,[9] but rather allegedly engages principally, if not entirely, in legal defense and "public relations" functions.

Respondent's argument not only is not supported by the record, but is irrelevant.

First, there was no evidence that petitioner's activities are restricted to legal defense and public relations. The assertion was specifically denied by petitioner's representative at trial (Tr. at 14,312), and the denial was uncontroverted.

Second, even if petitioner were engaged only in legal defense and public relations activities, it still would be entitled to the due process and equal protection rights not to be deprived of its statutory appeal by arbitrary and confiscatory application of a bonding requirement. Such fundamental requirements of fairness cannot be denied based upon the nature of the lawful activity in which an organization engages.

Third, provision of legal defense and public relations services to protect or vindicate associational rights itself lies at the core of First Amendment protections just as much as provision of religious services. *NAACP* v. *Alabama,* 357 U.S. 449, 460-61 (1958); *NAACP* v. *Button,* 371 U.S. 415, 428-31 (1963). And when such activities are provided on behalf of a religious movement, they become part of the very exercise of religious belief itself. *Murdock* v. *Pennsylvania,* 319 U.S. 105 (1943).[10]

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[9] There is no dispute that at the time of the events giving rise to the underlying lawsuit, petitioner provided religious services to its members. Indeed, respondent's judgment is based upon a jury's evaluation of the efficacy of those peaceful and voluntary religious services.

[10] Thus, when a church engages in "public relations", it engages in the proselytization of the church or religion, an activity pro-

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In *Henry* v. *First National Bank of Clarksdale,* 595 F.2d 291 (5th Cir. 1979) *cert. denied,* 444 U.S. 1074 (1980) the court held that the imminent destruction, by arbitrary application of a state bonding requirement, of an organization which engaged precisely in, *inter alia,* legal defense and public relations services threatened the organization's rights not only under the due process clause, but under the First Amendment as well. So here, petitioner's legal defense and public relations activities are protected by the First Amendment and, in the absence of a stay of execution or substantial reduction of bond, face imminent destruction by arbitrary application of the state bonding requirement.

IV. Respondent fails to explain why his interests would be impaired if this Court were to grant the petition or suspend action on it pending a decision in the *Texaco* case.[11] Respondent does not suggest that the appeal in the underlying state litigation does not present meritorious grounds for reversal of the extraordinary trial court judgment.

Respondent's assertion that he will suffer continuing prejudice if certiorari is granted and/or the stay is continued is belied by the fact that respondent himself obtained a thirty-day extension to respond to the petition in this Court. In addition, respondent also obtained a thirty-day extension to file his brief in the underlying state court appeal. Further, in applying for the state extension, respondent represented that the Church would not be prej-

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tected by both the religion and speech clauses of the First Amendment. *Murdock,* 319 U.S. at 108-10.

Similarly legal defense of churches is essential to protect the underlying religious activities protected by the First Amendment. *NAACP* v. *Alabama, supra,* 357 U.S. at 460-61; *NAACP* v. *Button, supra,* 371 U.S. at 431, 434-37.

[11] Petitioner suggested that the Court might wish to defer ruling on the Petition until the *Texaco* case is decided given the clear relationship of the issues in the two cases. Petition p. 11, n. 12.

udiced if it were granted. But the Church is not prejudiced only if a stay or an affordable bond is ordered; the delay of the underlying appeal resulting from respondent's delay further undercuts the effectiveness of the appeal. Moreover, respondent ignores the protection currently in place which preserves the assets of petitioner, subject to the trial court's control, and petitioner's offer to post a 5.1 million dollar bond if deemed necessary.[12] Respondent's interests are fully preserved and protected.

CONCLUSION

For the reasons stated above and in the petition for certiorari, petitioner's request for a writ of certiorari should be granted.

Dated: March 18, 1987
New York, New York

Respectfully submitted,

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[12] Indeed, since petitioner has only 5.1 million dollars available in unpledged assets, such a bond would offer as full and complete protection as enforcement of the judgment. This would also fully secure the compensatory portion of the judgment. Certainly, as to the remaining twenty-five million dollars assessed as punitive damages the state interest is vastly reduced. *See Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) (The "state interest extends no further than compensation for actual injury.")